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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JUNO COLLECTION, INC., et al., Plaintiffs and Appellants, v. BELEZA FASHION, INC., et al., Defendants and Respondents.	B208651 (Los Angeles County Super. Ct. No. BC367834)

APPEAL from judgments of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Affirmed.

Law Offices of Baird A. Brown, Baird A. Brown for Plaintiffs and Appellants.

Nielsen, Haley & Abbott, Mary N. Abbott, James C. Nielsen, August L. Lohuaru for Defendant and Respondent Beleza Fashion, Inc.

Lewis Brisbois Bisgaard & Smith, Timothy R. Windham, Mark L. Hirschberg for Defendant and Respondent Investment Consultants, LLC.

A fire broke out in a commercial building on San Julian Street in the garment district of downtown Los Angeles. All four tenants in the building—four small wholesale clothing businesses—suffered property losses. Two of those business, plaintiffs Juno Collection, Inc., and Red Zone Wear, Inc. (hereinafter collectively referred to as Juno), sued a cotenant, defendant Beleza Fashion, Inc. (Beleza), for negligence, alleging that the fire was caused by Beleza's faulty installation of an air conditioning unit eight weeks before the fire. Juno also sued defendant Investment Consultants, LLC (Investment), the building's property manager, for failure to approve, review, and supervise the air conditioning installation.

We find that the trial court properly granted summary judgment in favor of Beleza and Investment because there was no triable issue of fact on the critical element of causation. No admissible or probative evidence rose above mere speculation that the cause of the fire was purportedly the negligent installation of the air conditioning unit. Nor is there any merit to complaints about the trial court's assessment of various declarations and evidentiary matters, the denial of two continuance requests, the refusal to apply the doctrine of res ipsa loquitur, the failure to apply an inference from the alleged spoliation of evidence, or the denial of the motion to tax costs. Thus, we affirm the summary judgments in favor of Beleza and Investment.

FACTUAL AND PROCEDURAL SUMMARY

Juno filed a complaint alleging a single cause of action for negligence. The complaint alleged that Global Refrigeration, Inc. (Global), negligently installed without permits an air conditioning unit, and that the tenant who had it installed on its premises (Beleza) and the property manager (Investment) negligently failed to approve, review, supervise, and oversee the installation. Juno alleged that as a result of Beleza's and Investment's negligent actions and failure to act, a fire on September 1, 2006, completely destroyed Juno's business. Global was also named as a defendant, but failed to appear and defaulted. The owner of the building, K.B. Partnership, was not a party to the litigation.

Pretrial discovery revealed further details about the fire. After the fire broke out, the air conditioner continued to operate normally. Alerted to the fire, Beleza's owner, Si Young Lee, turned off the air conditioner as she evacuated the building. The Los Angeles Fire Department (LAFD) investigated the fire. However, LAFD investigators could not determine the *precise point of origin* of the fire and could only assess the cause of the fire as "most probably" an unidentified "electrical malfunction." The *precise cause* of the fire could not be determined. LAFD investigators did determine that the fire began somewhere in the upper rear of the building, in the southwest corner. On the day of the fire, the southernmost unit of the building was occupied by tenant ABM Jeans, Inc., not by Beleza.

After pretrial discovery, Beleza and Investment filed separate motions for summary judgment. Investment filed its motion approximately a month after the trial court granted Beleza's motion for summary judgment.

Both Beleza and Investment argued that there was no evidence that the fire was caused by anything either of them did or did not do. They both relied, in part, on the declaration of Henry Roemisch, an expert fire investigator who inspected the scene of the fire and found that the air conditioning unit was on the east side, at the opposite side of the portion of the roof that had collapsed from the fire. The air conditioning unit was undamaged and still in place after the fire. Roemisch concluded that the "air conditioning unit was not the cause of the fire," and that the "actual cause of the fire is undeterminable." Roemisch explained that "due to the extent of damage," it was "not possible for me to determine the specific origin or cause" of the fire; "[t]here can only be speculation."

In opposing Beleza's motion for summary judgment, Juno filed, among other items, a declaration by Albert Hernandez, an expert fire investigator. Hernandez visited the fire scene twice in the fall of 2006, met with an electrician who inspected the electrical system at Beleza shortly before the fire, and reviewed numerous building photographs, building permit documents, and the specifications of the air conditioning unit installed by Beleza. Hernandez remarked that in December of 2006, he coordinated

with an investigator for the building's property manager, Investment, to inspect the roof and upper areas of the burned building. However, they were unable inspect the area because the roof and interior of the building had been demolished, contrary to the demand by Juno's counsel "to allow the inspection and preserve all evidence."

Hernandez declared that despite the demolition he was "able to form certain opinions and conclusions about the fire." Hernandez asserted that approximately six weeks before the fire, Beleza hired Global to install an air conditioning unit consisting of an inside unit and an outside unit. The inside unit was located in the front portion of the ground floor of Beleza's premises and was connected to the outside unit located on the roof at the front of the building. Global connected the outside unit to Beleza's electrical panel located at the rear of the building by running wire along the roof of the building and then down to the panel, using more than 200 feet of wire.

According to Hernandez, the air conditioning installation was "illegal" because it lacked the requisite permits and city approvals. Global's work was "shoddy" because the wires connecting the inside and outside units allegedly were not enclosed in conduit, no junction boxes were used, and the wire used was not large enough, "which increased the potential for resistive heating and ultimate failure and fire."

The Hernandez declaration further asserted that the fire started in the upper reaches of the Beleza premises, at the rear and adjacent to another tenant, where Global had strung the 200 feet of wire connecting the rooftop air conditioner unit to Beleza's electrical panel. The electrical devices of the other three tenants were confined to the ground floor. He claimed that the other three tenants had no electrical problems in 2006, but that Beleza had experienced power outages after the installation of its air conditioning system in mid-July of 2006. Beleza purportedly had an electrician inspect its electrical system in late August of 2006 because of the power outages, and the electrician was unable to determine the problem. The fire broke out later that week.

Hernandez opined that "[t]he fire was electrical in nature." Hernandez also concluded that the declarations of defense experts (Gerard Moulin and Henry Roemisch), who ruled out the air conditioning unit as the cause of the fire, were "incorrect" because

they did not account for "the concept of resistive or resistance heating." Pursuant to this concept, current carried through wires and wire connections may overheat and cause a fire, even though the appliance serviced by the wires continues to operate. According to Hernandez, "Witnesses, LAFD investigators, and I all place the source of the fire in the vicinity of that [air conditioner] wiring in the rear part of the building."

Hernandez, however, did not specifically offer an opinion as to the precise cause of the fire, other than the fact that it was electrical in nature. Juno argued, "By process of elimination there is no other possible cause for the fire apart from the Beleza [air conditioning] installation."

Juno's opposition to Beleza's motion for summary judgment also relied on a declaration by Mario Torres, an employee at Juno. Torres asserted that he had spoken to a Beleza employee who told him that before the fire Beleza had been having electrical problems with its newly installed air conditioning unit. Torres also claimed that the Beleza employee told him that Beleza did not have electrical power in its front showroom and had to use an extension cord from another area.

Beleza successfully objected to the declaration by Hernandez, in pertinent part, on the following grounds: that Hernandez was a fire expert only and not qualified to testify as an electrical engineer or an electrician; that his opinion was based on faulty information (such as the alleged lack of conduit for the wire, although a purchase invoice specifically listed metallic conduit); that there was no competent evidence as to exactly where the fire started; that Hernandez's conversation with Beleza's electrician about prior outages was hearsay; that Hernandez's statement of where LAFD placed the source of the fire was hearsay; and that there was no foundation for the assertions about the wiring because Hernandez never saw the roof of the building where he claimed the wiring was located. The trial court also sustained objections by Beleza to statements in two other declarations (declarations by Torres and by Juno's counsel), and to several documents on the grounds of hearsay, lack of personal knowledge, and improper authentication.

The trial court then granted Beleza's motion for summary judgment. The court did so because Beleza had presented sufficient and competent evidence "to show that the

essential element of causation cannot be established." The burden thus shifted to plaintiffs to demonstrate the existence of a triable issue of material fact as to the element of causation, and they failed to do any more than criticize through speculative testimony and thus failed to meet their burden of proof. Based on admitted and undisputed facts cited by the court, it then found an absence of proof that the damages were proximately caused by the action or inaction of Beleza, and found a failure to establish a prima facie cause of action for negligence.

Investment then filed its motion for summary judgment. Juno's opposition included, in pertinent part, the same declaration by Hernandez that Juno had filed in opposing Beleza's motion, as well as a second declaration by Hernandez, the same declaration by Mario Torres, and a declaration by Arthur Floyd, an electrical engineering expert.[1] Floyd opined that Global's workmanship was "shoddy," that it was not in compliance with building codes, and that the wiring was susceptible to resistive heating and ultimately a fire. Floyd also claimed that two witnesses reported to LAFD that they had seen sparks coming from the electrical panels at the rear of the Beleza area, "exactly where fire investigators believe the fire started and spread from." Floyd also related that an electrician had told occupants of the building that air conditioning circuits should not be added because of the likelihood of overloading the circuit panels, and Floyd asserted that overloaded circuit panels are generally considered a main cause of electrical fires.

Floyd also considered "the faulty air conditioning system installation . . . a disaster waiting to happen." According to Floyd, the various improper aspects of the installation, including the overloaded circuit breaker box, "all contributed to the arcing and sparking which is known to have started the fire. Two persons reported to the fire department that

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[1] Juno's opposition to Investment's motion for summary judgment was somewhat different than its opposition to Beleza's motion for summary judgment in that it contained additional and declarations and exhibits. We focus only on those documents central to the disposition of the present appeals.

before leaving the Building they attempted to use fire extinguishers and a garden hose in the area of the circuit boxes at the rear of the Beleza space to put out the fire."

Investment filed written objections to much of Juno's evidence. Investment objected to the declarations of Hernandez and Floyd as incompetent, speculative, lacking in foundation, relying on hearsay, and hence inadmissible to prove causation. Investment also objected on hearsay grounds to the statements by Torres.

The trial court did not specifically rule on Investment's objections, but it then granted Investment's motion for summary judgment. The court found as follows: that plaintiffs had failed to establish triable issues of material fact because LAFD could not determine "the precise point of origin" or "the precise cause" of the fire; that there was no evidence to establish a causal connection between the installation of the Beleza air conditioning unit and the fire; and that the actual cause of the fire was "undeterminable." Thus, the court found that the requisite element of causation lacking.

Thereafter, the trial court denied Juno's motion for a new trial and denied its motion to tax costs. Judgments were entered in favor of Beleza and Investment.

Juno separately appealed both judgments, and we consolidated the appeals.

DISCUSSION

I. Relevant standards of review.

In accordance with the customary standard of appellate review, we review de novo the trial court's decision to grant summary judgment. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.) However, in applying the de novo standard, an appellate court considers all evidence the parties offered "except that to which objections have been made and sustained by the [trial] court." (Code Civ. Proc., § 437c, subd. (c); see *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

Regarding evidentiary issues, we generally review "any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 201; see *City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) An abuse of discretion implies an "'arbitrary determination, capricious disposition or whimsical thinking.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85.) To prevail on appeal with a

claim of abuse of discretion, plaintiff must establish that the trial court's ruling "exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

II. The summary judgment in favor of Beleza.

Objections to the Hernandez and Torres declarations were properly sustained.

In the present case, plaintiffs have impermissibly relied on declarations (by Hernandez and Torres) to which evidentiary objections were sustained. As previously noted, we may not consider evidence to which objections were sustained (*Merrill v. Navegar, Inc., supra,* 26 Cal.4th at p. 476), and must review exclusion rulings for abuse of discretion (*People v. Alvarez, supra*, 14 Cal.4th at p. 201).

Here, Juno complains that the trial court erroneously sustained objections to the Hernandez and Torres declarations. Regarding the rejection of purported expert testimony, "The trial court will be deemed to have abused its discretion if the witness has disclosed sufficient knowledge of the subject to entitle his opinion to go before the jury." (*Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1442-1443.) Nonetheless, """In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited."""" (*People v. Palmer* (1978) 80 Cal.App.3d 239, 254.) "'Qualifications on related subject matter are insufficient.'" (*People v. Chavez* (1985) 39 Cal.3d 823, 828.)

Juno asserts that the court abused its discretion in not allowing Hernandez's testimony because Hernandez had sufficient skill or experience in the field so his testimony would likely assist the jury. However, as the trial court aptly observed, Hernandez had expertise in the area of fires, but was not an electrical engineer or an electrician and had no training or experience in those fields. Thus, Hernandez's attempt to provide testimony as to electrical wiring, electrical equipment, and the electrical installation of an air conditioner was indeed outside the area of his expertise. Hernandez simply was not qualified and competent to offer an expert opinion on the ultimate conclusion that the air conditioning unit was purportedly negligently wired.

Additionally, the trial court found that critical portions of the Hernandez declaration lacked foundation (Evid. Code, §§ 720, 721, 800-804), constituted

speculation without necessary personal knowledge (Evid. Code, § 702, subd. (a)), and contained hearsay (Evid. Code, § 1200). The trial court did not abuse its discretion and properly sustained such objections.

Regarding the Torres declaration, Beleza objected on hearsay grounds (Evid. Code, § 1200) to two paragraphs in the declaration in which Torres related what another person had supposedly told him. Specifically, Beleza objected to statements about what an employee at Beleza had supposedly told Torres: (1) that Beleza had been having electrical problems with its newly installed air conditioning unit, and (2) that Beleza did not have power in its front showroom and had to use an extension cord.

Juno urges that the statements should have been admitted as party admissions. (Evid. Code, § 1220 et seq.) However, that hearsay exception would apply only if the statements were "made by a person authorized by the party to make a statement" and is offered "after admission of evidence sufficient to sustain a finding of such authority." (Evid. Code, § 1222, subds. (a), (b).) Juno offered no evidence to support a finding that the employee was authorized by Beleza to make statements on its behalf, and it made no effort to depose the employee. The trial court did not abuse its discretion when it found no relevant exception to the hearsay rule and properly sustained the objection to the Torres declaration.

Insufficient evidence of causation.

Juno failed to produce sufficient evidence of causation. Juno sued for negligence, which requires proof that the conduct of Beleza and Investment caused the fire. (See *Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 426-427.) The element of causation would be satisfied if Juno produced evidence that some negligent act by them was a substantial factor in bringing about the fire. (*Id.* at p. 427.) The question is for the court rather than a jury to determine when the facts are undisputed, or when reasonable minds cannot dispute the absence of sufficient proof of causation; then, a "'court may take the decision from the jury and treat the question as one of law.'" (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 207.)

In the present case, Juno focuses on hearsay accounts from unidentified witnesses about sparks and arcing. There is no dispute that the fire started somewhere in the upper recesses of the southern portion of the building in the mezzanine attic shared by all four tenants. No one saw the fire start. Thus, sparks and arcing while the fire burned would not establish causation.

Even if the declarations by Hernandez and Torres had been admitted, Juno still could not have satisfied its burden of establishing causation. Hernandez criticized the electrical installation of the air conditioning unit, but he never specifically declared that its installation caused the fire. And, he admitted he was unable to inspect the roof of the building or the wiring he hoped to assign as the culprit.

Moreover, although Hernandez did state that the cause of the fire was "electrical," there are a myriad of possible causes for an electrical fire in an old building. As noted by Beleza, an electrical fire could be triggered, for example, by rodents gnawing on wires, frayed wire from old installations, earthquake-loosened connections, aging insulation, or poor maintenance having nothing to do with the air conditioner unit. Indeed, the LAFD investigator observed numerous electrical cords and electrical conduit at the mezzanine ceiling level and in the attic space.

Nor may causation be established by Hernandez's conclusion that the contractor's work was "shoddy" and done without a permit. "Proof of violation of a law does not establish actionable negligence unless there exists a causal connection between the violation and the act which causes injury . . . [and establishes] that the violation was a proximate cause." (*Green v. Menveg Properties, Inc.* (1954) 126 Cal.App.2d 1, 11; see Evid. Code, § 669, subd. (a)(2).)

Likewise, the excluded declaration by Torres would not have established causation either. As Torres acknowledged during his deposition, he was present on the day of the fire but did not see where the fire started and did not know what caused the fire. Similarly, plaintiff Red Zone's manager (Julio Garcia) and owner (Emma Vasquez) did not see where the fire started or the origin or cause of the fire.

Accordingly, plaintiffs' managers and owners did not know the cause of the fire, LAFD could not determine the cause of the fire, and Beleza's experts said the cause of the fire could not be determined. Even the excluded testimony from Juno's expert merely criticized the wiring and speculated, but he did not specifically find that the air conditioning unit had caused the fire. As the trial court aptly concluded, "I don't know how anybody would prove this case."

Mere speculation is simply insufficient to show an actual causal link between the fire and the air conditioning unit's installation. "'[P]roof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence, or on an expert's opinion based on inferences, speculation and conjecture.'" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775.) "'A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court*'" to ensure that the defendant prevails. (*Id.* at pp. 775-776.) "[A] court is not bound by expert opinion that is speculative or conjectural. [Citations.] Plaintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning." (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1106; see also *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1110.)

Therefore, the trial court did not err in granting summary judgment.

Res ipsa loquitur is inapplicable.

"The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence." (Evid. Code, § 646, subd. (b).) It applies when (1) the accident is a kind which ordinarily does not occur in the absence of someone's negligence, (2) it is caused by an agency or instrumentality within the exclusive control of the defendant, and (3) it was not due to any voluntary action or contribution on the part of the plaintiff. (*Ybarra v. Spangard* (1944) 25 Cal.2d 486, 489.) "The res ipsa loquitur doctrine is not intended to open the door for mere speculation as to the cause of an injury." (*Nelson v.*

Douglas Pedlow, Inc. (1955) 130 Cal.App.2d 780, 784.) It is not a substitute for proof of causation. (*Brocato v. Standard Oil Co.* (1958) 164 Cal.App.2d 749, 757.)

In the present case, the doctrine of res ipsa loquitur is inapplicable because (1) Juno could not establish that the fire was not the kind of accident that ordinarily would not occur in the absence of someone's negligence, and (2) Juno failed to prove the fire was caused by an agency or instrumentality within the exclusive control of Beleza or Investment.

"The mere fact that the fire occurred is insufficient to raise an inference of negligence on the part of [defendant]." (*Bartholomai v. Owl Drug Co.* (1940) 42 Cal.App.2d 38, 42.) "'[T]here are many accidents which, as a matter of common knowledge, occur frequently enough without anyone's fault.' [Dean Prosser] then gives examples including 'a fire of unknown origin' and says that such occurrences 'will not in themselves justify the conclusion that negligence is the most likely explanation; and to such events res ipsa loquitur does not apply.'" (*Gentleman v. Nadell & Co.* (1961) 197 Cal.App.2d 545, 554.) Here, the precise point of origin of the fire was unknown, and it cannot be said that the fire would not ordinarily occur without someone's negligence.

As to the second point, Juno failed to establish that the fire was caused by an agency or instrumentality within the exclusive control of Beleza or Investment. The LAFD investigator not only stated that he could not determine the cause of the fire, but he even testified that he "looked at the air conditioner [and] [i]t had nothing to do with this fire." Likewise, Beleza's experts (Roemisch and Moulin) concluded that the actual cause of the fire could not be determined. Juno did not rebut this testimony. Indeed, Torres did not know what caused the fire. Nor did the manager and owner of plaintiff Red Zone know what caused the fire.

Thus, res ipsa loquitur is inapplicable. It is a rule of evidence that allows an inference of negligence "from proven facts," and it cannot be employed "to infer negligence where the cause of an accident is merely speculative [citation], that is, where there are several possible causes and no cause can be excluded or included by the evidence." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75, 77.)

The trial court did not err in denying Juno's requests for a continuance.

Pursuant to Code of Civil Procedure section 437c, subdivision (h), "The application to continue the motion [for summary judgment] to obtain necessary discovery may . . . be made by ex parte motion *at any time on or before the date the opposition response to the motion is due*." (Italics added.) Here, five days after Juno's opposition was due (and had actually been filed), Juno applied ex parte for a continuance of the hearing. The trial court acted well within its discretion in denying the untimely request. (See *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

Juno also included a request for a continuance in its opposition to the summary judgment motion. A party must support such a request with a declaration that "must show: '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts.'" (*Cooksey v. Alexakis*, *supra*, 123 Cal.App.4th at p. 254.) "[T]he mere indication of a desire to conduct further discovery [is] insufficient to support a continuance," and "a continuance [is] not justified . . . when the party seeking to block the motion for summary judgment has had more than ample time for discovery and the additional discovery sought would have pertained to irrelevant issues." (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397.)

Here, Beleza opposed the motion for a continuance because Juno had stated insufficient grounds and failed to offer any justification for why discovery could not have been completed earlier; Juno had been dilatory in discovery and made no showing that the facts sought were essential to determining causation. Juno had filed its lawsuit approximately a year before Beleza's motion was heard. Six months earlier, at a case management conference, Beleza had advised the court and counsel of its intention to focus on causation in its motion. Between then and the filing of its motion for summary judgment, Juno took no depositions. Juno waited approximately eight more weeks after service of the summary judgment motion to take its first deposition, just one week before its opposition was due. Absent a showing of diligence by the party seeking the

continuance to conduct further discovery, we cannot find the court abused its discretion in denying the request for a continuance.

Finally, Juno complains that it needed more time to obtain "additional evidence including the [Tony] Yu declaration." Yu, a sales manager for one of the building tenants (ABM Jeans), purportedly wanted more time to review the declaration's language with an insurance adjuster. Juno urged in its motion for a continuance that the declaration by a nonparty witness (who Juno did not identify) was "important to counter Beleza's res ipsa loquitur argument," but they did not specify how it was important or what specifically it would contain. At the hearing, Juno indicated it wanted a continuance to have a declaration authenticating a photograph. The court found that even authenticating the photograph would not lead to the conclusion that the air conditioning unit caused the fire. In view of the vague and uncompelling circumstances described in the request, we find no abuse of discretion in denying the continuance.

The trial court did not abuse its discretion in denying Juno's motion for a new trial as to the summary judgment in favor of Beleza.

"The granting or denial of a motion for a new trial rests so completely within the discretion of the trial court that an appellate court will not interfere unless a patent abuse of discretion appears. There must first be an 'affirmative showing of a gross, manifest or unmistakable abuse of discretion.'" (*Brown v. Guy* (1959) 170 Cal.App.2d 256, 263.) "Generally, a party seeking a new trial on [the basis of supposed new evidence] must show that '(1) the evidence is newly discovered; (2) he or she exercised reasonable diligence in discovering and producing it; and (3) it is material to the [ ] party's case.' [Citation.] If the party's showing is clearly 'lacking in essential particulars,' the grant of a new trial is an abuse of discretion." (*Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1506.) In fact, generally "when a party seeking a new trial knew, or should have known, about the pertinent evidence before trial but did not exercise due diligence in producing it, the grant of a new trial is error." (*Id.* at p. 1509.)

In the present case, Juno's motion for a new trial again complained about alleged errors in sustaining objections to the declarations of Hernandez and Torres, and in

refusing requests for a continuance. The motion for a new trial finally contained the declaration by Tony Yu. The Yu declaration asserted that ABM Jeans had no recent electrical installations before the fire, that all of its appliances and equipment were located on the ground floor of the building, and that a few months before the fire an unidentified contractor looked at the electrical system and recommended against installing an air conditioning unit for ABM Jeans because the building's power was inadequate and there would be an electrical overload if it were installed. Yu also identified a photograph he took after the fire.

Beleza's opposition to the new trial motion included an objection on hearsay grounds to the portion of Yu's declaration that related what an unidentified contractor had told him. The trial court found that even if it construed Yu's declaration as newly discovered evidence, plaintiffs still failed to "connect the dots in terms of causation for the fire." Also, as previously discussed, the trial court did not err in sustaining objections to the declarations by Hernandez and Torres. The trial court's denial of a new trial was not an abuse of its broad discretion.

III. The summary judgment in favor of Investment.

No triable issues of material fact.

Investment filed its own motion for summary judgment approximately a month after the trial court granted Beleza's motion for summary judgment. Investment's motion was largely the same as Beleza's motion. Juno's opposition to Investment's motion for summary judgment included the same declarations included in its opposition to Beleza's motion, but added a more elaborate declaration by Al Hernandez, declarations from Tony Yu and Arthur Floyd, and some building photographs.

According to Juno, the evidence contained in its opposition to Investment's motion for summary judgment reflected numerous triable issues of fact, and because the trial court did not rule on Investment's evidentiary objections, all of Juno's opposition evidence must be deemed admitted. Juno relies on *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, which held that "a trial court presented with timely evidentiary objections in proper form must expressly rule on the individual

objections, and if it does not, the objections are deemed waived and the objected-to evidence included in the record." (*Id.* at p. 578.) However, even *Demps*, acknowledged that "various courts have recognized exceptions to this general rule of waiver where counsel has expressly requested a ruling on the objections and the trial court has failed to rule" (*id.* at p. 579), such as where counsel repeatedly requests a ruling, but the trial court inexplicably does not rule. (*Ibid.*; see *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

The trial court here did not rule on Investment's evidentiary objections, but it had previously sustained many of the same evidentiary objections when previously raised by Beleza, and it granted summary judgment in favor of both Investment and Beleza. In this unique context, whether based on the doctrine of collateral estoppel or basic common sense, we have no difficulty in concluding that the trial court sustained the same objections raised by Investment that it had previously sustained when raised by Beleza concerning the same evidence.

We acknowledge that Juno also added some additional evidence in support of its opposition to Investment's motion for summary judgment that Juno did not offer in its prior opposition to Beleza's motion for summary judgment. And, the newly added evidence—the second declaration by Hernandez, the declarations by Yu and Floyd, etc.—is susceptible to the argument that the objections by Investment were waived for failure to obtain rulings. "Although many of the objections appear meritorious, for purposes of this appeal we must view the objectionable evidence as having been admitted in evidence and therefore as part of the record." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1; see also *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1.)

Nonetheless, the additional evidence not addressed by the trial court's prior rulings on evidentiary matters raised by Beleza does not change the outcome for Juno. There is still insufficient evidence of causation. Hernandez's second declaration focused on how his effort to return to the scene with a cherry picker to inspect the roof top air conditioning unit and wiring was frustrated by the demolition of the building. He also

claimed that from his prior inspection of the building and from conversations with other unnamed fire investigators it was likely that Beleza's air conditioning system had been improperly installed and had caused the fire.

However, Hernandez's assertion was not offered as that of a percipient witness to recount observations on roof top wiring (a roof top to which he could not gain access), but as an expert witness for the ultimate conclusion that the air conditioner was negligently wired. On that issue, he still was not competent to testify. (Evid. Code, § 801, subd. (b); see *Thompson v. Sacramento City Unified School District* (2003) 107 Cal.App.4th 1352, 1372-1373; *Jeffer, Mangels & Butler v. Glickman*, *supra*, 234 Cal.App.3d at pp. 1442-1443.) His remark that it was likely to have caused the fire was speculative, based on conjecture, and premised on assumptions of fact lacking evidentiary support. He failed to establish "some actual causal link." (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 774.)

Regarding the declarations by Floyd, an electrical contractor, and Yu, the sales manager at ABM Jeans, the trial court also made no formal rulings. However, apart from issues of competency, they asserted only speculation and innuendo and also offered no actual causal link between the air conditioning unit and the fire.[2]

Accordingly, the trial court did not err in granting summary judgment in favor of Investment.

The trial court properly exercised its discretion in refusing to consider whether Investment spoliated evidence.

Juno contends that Investment is guilty of spoliation of evidence because it intentionally gutted the building, thus destroying all evidence of the fire. However, plaintiffs have failed to produce any admissible evidence that Investment was responsible for destroying the evidence.

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[2] Nor is the doctrine of res ipsa loquitur applicable, as previously discussed in the context of the summary judgment in favor of Beleza.

In a letter dated November 24, 2006, counsel representing Juno faxed a letter to the insurance adjusters for Investment and Beleza. Counsel's letter demanded "that all evidence relative to the fire be preserved intact and unaltered, that you advise me immediately as to the location of all such evidence, that you authorize Mr. Hernandez to have immediate access to all such evidence, and that you immediately provide your insureds with a copy of this letter." On November 30, 2006, counsel for Juno also faxed a copy of that letter to Investment's office manager, Mahnoush Ghaffari. In late December of 2006, the building was "completely gutted," and the roof and air conditioning unit were removed.

The problem with Juno's claim of spoliation, however, is that the building and evidence of the fire were not destroyed by any action attributable to Investment or Beleza. Rather, the building and evidence of the fire were destroyed by the owners of the building when they had the building demolished and the site cleaned up in preparation for rebuilding. As revealed by the deposition testimony of Investment's office manager (Mahnoush Ghaffari), the owners of the fire-damaged building (the two partners in KB Partners) made the decision to destroy the building. Ghaffari specifically explained that the demolition of the building was not an issue in which Investment was involved. After the fire, apparently there simply was no tenant property for Investment to manage, and the owners themselves moved promptly to demolish and rebuild.

Thus, Investment was not responsible for any spoliation of evidence.

IV. The trial court did not abuse its discretion in denying plaintiffs' motion to tax costs.

Beleza filed a memorandum of costs totaling $8,964.58. The bulk of the costs claimed, related to the depositions of six witnesses—costs for the transcriptions and the use of interpreters. Juno moved to strike or tax costs, arguing that Beleza "claimed too much" for deposition transcribing expenses, and that the per-page cost for deposition transcripts should have been approximately $5.75 rather than the claimed rate of from $7.28 to $14.89. Beleza countered by providing a court reporter's invoice and every cancelled check reflecting its payment of the expenses. The trial court found that the

exhibits provided by the defense showed what was actually paid and thus defeated Juno's motion. In response to the argument that the costs were too high, the court found that Juno did not establish that the costs were unreasonable.

The transcribing of necessary depositions is expressly allowed by statute. (Code Civ. Proc., § 1033.5, subd. (a)(3).) Juno failed to establish that the costs were "unnecessary or unreasonable." (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.) "The trial court's exercise of discretion in granting or denying a motion to tax costs will not be disturbed if substantial evidence supports its decision." (*Jewell v. Bank of America* (1990) 220 Cal.App.3d 934, 941.) Here, the court reporter invoices and cancelled checks reflecting payment of the invoices constituted substantial evidence, and there was no showing that the expenses, though arguably high, were unreasonable. Thus, the trial court did not abuse it discretion in denying the motion to tax costs.

DISPOSITION

The judgments in favor of Beleza and Investment are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.